

RENDERED: APRIL 17, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

MODIFIED: APRIL 24, 2009; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002521-ME

DENISE MARIE FOX

APPELLANT

v. ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2007-SC-000771

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEVIN L. GARVEY, JUDGE
ACTION NO. 05-CI-504431

THOMAS C. MINA

APPELLEE

OPINION REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: NICKELL, STUMBO, AND THOMPSON, JUDGES.

STUMBO, JUDGE: Denise Marie Fox appealed from findings of fact, conclusions of law and judgment of the Jefferson Circuit Court in an action to modify child custody. Fox argued that the court improperly awarded custody of her minor child,

Pasqualina, to the child's father, Thomas C. Mina, because the court lacked subject matter jurisdiction and because its findings were clearly erroneous. In our original opinion, we held that her first argument was well taken and reversed. Mina sought discretionary review. The Supreme Court granted his motion and vacated and remanded our decision for reconsideration in light of its recent opinion in *Coffman v. Rankin*, 260 S.W.3d 767, 769 (Ky. 2008).

Because the parties are familiar with the facts, we will not set them forth in detail. In 2004, the parties' minor child, Pasqualina, was placed into the temporary custody of Fox's sister upon a finding of abuse by Fox in the form of excessive physical and vaginal examinations by her pediatrician and a hospital after each visit with her father, Thomas Mina. This order was entered by the Jefferson Family Court as the result of an action brought under the juvenile statutes. Custody had previously been awarded to Fox by the District Court as part of an action which established paternity of the child. We note that both of these actions, while filed in the Family Court, are actions normally filed in the District Courts.

In 2005, Mina filed a petition for sole custody utilizing KRS 23A.100, an action placed within the jurisdiction of the Circuit Court. The petition - an original action rather than a motion to modify the 2001 judgment or the 2004 temporary custody order - was treated as a motion to modify custody under KRS 403.340. Proof was taken, whereupon the court rendered the judgment on September 1, 2006, which forms the basis of the instant appeal. The trial court

entered comprehensive and detailed findings of fact and awarded sole custody of Pasqualina to her father. This appeal followed.

Fox now argues that the trial court erred in awarding sole custody of Pasqualina to Mina. She maintains that the Jefferson Circuit Court was without jurisdiction to adjudicate the petition for custody because the petition failed to comply with KRS 403.350, and argues that the court's findings are clearly erroneous. She notes that pursuant to KRS 403.350, a party moving to modify custody must submit with the motion an affidavit setting forth facts supporting the requested relief. Because Mina filed a petition seeking custody, rather than a motion and affidavit pursuant to KRS 403.350, Fox argues that the Jefferson Circuit Court was without jurisdiction to adjudicate the claim. Alternatively, she contends that even if jurisdiction were properly exercised, the court's findings of fact were not supported by substantial evidence and were therefore clearly erroneous. In sum, she seeks an order reversing the judgment on appeal and remanding the matter for further proceedings. We note that this argument was not raised at the trial court.

Our original opinion concluded that we must reverse and remand the judgment on appeal. KRS 403.350 states that,

A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. If a court determines that a child is in the

custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted. (Emphasis added.)

There can be little doubt but that a motion to modify custody must be accompanied by an affidavit setting forth facts supporting the requested order. The question then is whether Mina's petition for custody constitutes a motion to modify custody. Mina contends that his December 1, 2005, petition was an original action which was separate and distinct from Fox's March 1, 1999, verified petition for custody, and that as such he was not seeking "modification of a custody order" as set forth in KRS 403.350. It is clear, though, that the April 10, 2001, judgment awarded sole custody of Pasqualina, and that subsequent custody actions - whether styled as a motion or petition - necessarily operated to modify that award.

Our original conclusion was that KRS 403.800(11) is dispositive of this issue. It states that, "[m]odification' means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination" Mina was seeking such a determination, whether one characterizes his petition as seeking to supersede the April 10, 2001, judgment or the 2004 temporary custody order. Similarly, it is a "modification" just the same whether the underlying custody order arose in District or Circuit Court. *Id.* (stating, "whether or not it is made by the court that made the previous

determination . . .”). Following previously published authority, we concluded that the affidavit requirement is jurisdictional. “[T]he circuit court does not acquire subject matter jurisdiction over a motion to modify a prior custody decree unless the motion is accompanied by the requisite affidavit or affidavits.” *Petrey v. Cain*, 987 S.W.2d 786, 788 (Ky. 1999). We felt that this was important in two respects: first, Fox did not preserve this argument for appellate review. Issues of subject matter jurisdiction are justiciable at any time despite a lack of preservation. CR 12.08 (3); *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005); *Goff v. Goff*, 172 S.W.3d 352 (Ky. 2005). Second, a lack of subject matter jurisdiction is fatal to the claim. *Milby v. Wright*, 952 S.W.2d 202 (Ky. 1997). Thus, we set the judgment aside.

In *Coffman v. Rankin*, 260 S.W.3d 767, 769 (Ky. 2008), the Kentucky Supreme Court addressed this issue:

[T]his court has held that subject matter jurisdiction to adjudicate a motion to modify a child custody determination is obtained by filing a proper motion and affidavit. We reiterate that holding here. The Family court determined that the moving papers were sufficient. Upon that determination, the court had subject matter jurisdiction to adjudicate the claim and proceed to the merits. There is no procedural vehicle to challenge the trial court’s determination that adequate cause for a hearing is shown. Such a determination is similar to an order overruling a motion for summary judgment. Any challenge must await the trial court’s final order and must be to the sufficiency of the evidence, a matter that must be preserved for appellate review. Therefore the Court of Appeals’ reversal was in error. (Footnotes omitted.)

The case at bar was remanded to us to reconsider our earlier opinion in light of the *Coffman* opinion. Our review of the new authority does not alter our previous opinion that the filing of a “proper motion and affidavit” is still necessary to confer upon the court subject matter jurisdiction. On its face, *Coffman* does not apply here because the issue there was not whether an affidavit had been filed but whether the moving papers presented a sufficient factual basis to support a finding of adequate cause for a hearing on the issue of modifying an order that established permanent custody of the subject children. It appears that the question we must consider then is whether the intervening *temporary* custody order renders KRS 403.350 inapplicable; that is, does the temporary order negate the requirement for affidavits in support of the motion? We do not believe so.

KRS 403.410 defines “decree” and “custody decree” as used in Chapter 403. A decree is “a custody determination contained in a judicial decree or order made in a custody proceeding” KRS 402.410(4). A “custody proceeding” is defined as a proceeding in which a custody determination is an issue and specifically includes “child neglect and dependency proceedings” KRS 402.410(3). Just as we held in our earlier opinion, the jurisdiction of the circuit court must be properly invoked by the filing of a proper motion, supported by an affidavit. *See Copas v. Copas*, 699 S.W.2d 758 (Ky. App. 1985). If the applicable requirement is not met, the circuit court is without authority to entertain the motion. *Chandler v. Chandler*, 535 S.W.2d 71 (Ky. 1975); *Robbins v. King*, 519 S.W.2d 839 (Ky. 1975); *Gladish v. Gladish*, 741 S.W.2d 658, 661 (Ky. App.

1987); *cf. Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970) (subject matter jurisdiction is absent “where the court has not been given any power to do anything at all”).

Given the nature of the claim and the evidence presented in support thereof, we are very reluctant to set aside the judgment on appeal. The case law and statutory requirements are, however, clear, unambiguous and subject to but one interpretation, i.e., that an affidavit must accompany the motion to modify custody and that such requirement is jurisdictional. Nevertheless, we are confident that on remand the Jefferson Circuit Court will fashion a remedy best suited to protecting Pasqualina’s welfare. Accordingly, we must reverse the judgment on appeal.

For the foregoing reasons, we reverse the findings of fact, conclusions of law and judgment of the Jefferson Circuit Court, and remand the matter for further proceedings.

ALL CONCUR.

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